SUPREME COURT, U. S.
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No. 74-53

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

JOE K. DEVITA,

Petitioner,

v.

BURLINGTON NORTHERN, INC.,
Successor in interest by merger to
Great Northern Railway Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM J. POWELL
BRYAN P. HARNETIAUX, Associate
1016 Washington Trust Building
Spokane, Washington 99201

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The petitioner, JOE K. DEVITA, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, rendered in these proceedings March 11 and May 8, 1974.

OPINIONS BELOW

The "awards" of the National Railroad Adjustment Board in Docket Nos. 41755, 41756 and 41757 all rendered on the 26th day of January, 1968 appear as Appendices "A", "B" and "C", **infra**, App. pp. 20-25.

The opinion of the Honorable Charles L. Powell, District Judge for the United States District Court, Eastern District of Washington, rendered November 30, 1971, appears at Appendix "D", **infra**, App. pp 26-29.

The opinion of the United States Court of Appeals for the Ninth Circuit, rendered March 11, 1974, appears at Appendix "E", **infra**, App. pp. 30-33.

The "Order Denying Petition for Rehearing and Amending Opinion" of the United States Court of Appeals for the Ninth Circuit, rendered May 8, 1974, appears at Appendix "F", **infra**, App. p. 34. (official National Reporter citations unavailable at this time)

JURISDICTION

Subject matter jursidiction for the court of first instance is based upon 28 U.S.C. 1331; 45 U.S.C. 151, 153 First (i), (q) and related provisions.

The order of the United States Court of Appeals for the Ninth Circuit, denying the Petition for Rehearing of its Opinion was entered May 8, 1974. See Appendix "F", App. p. 34, **infra**. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Do **Gunther v. San Diego & Arizona E. Ry Co.**, 382 U.S. 257 (1965) and 45 U.S.C. & 153, First (i), (q) preclude **any** review by a Federal Court of factual determinations by the National Railroad Adjustment Board, or like tribunal, concerning the **perfection** of the right of review by such Board? Specifically, may a Federal Court review a factual determination by the NRAB which denies consideration of a claim on the merits, based on a finding of failure to comply with the railroad's internal appellate procedure prior to submission of this controversary to NRAB?

2. If review by Federal Courts is permissable on factual determinations made by the NRAB concerning compliance with internal appellate procedure, what is the nature and scope of such review?

3. Did the District Court err in reviewing the factual determination of the NRAB on the procedural issue and in reversing and remanding the case to the Board for a determination on the merits of Devita's claim?

STATUTORY PROVISIONS INVOLVED

The following sections of the Railway Labor Act, 45 U.S.C. 151 **et seq** are involved in this Petition:

45 U.S.C. 153, First, (i) provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

45 U.S.C. 153, First, (q) provides:

> "If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States

district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28."

45 U.S.C. 153, First, (p) provides:

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and

order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, that such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

STATEMENT OF THE CASE

For twenty-two years prior to December 1964, Joe K. Devita was continuously employed by the Great Northern Railway Company (now Burlington Northern, Inc., hereafter referred to as the "Railroad") as a locomotive engineer. (R. 61) In December 1964, Devita was charged by the Railroad with one count of inciting and inducing insubordination in connection with his representation of another engineer in an investigation before Railroad officials. He was also charged with two counts of insubordination involving

Devita's notation of equipment defects on his time slips, after having been previously instructed by the master mechanic not to do so. (R. 61)

Subsequent to investigation of the above charges the Railroad, through its superintendent, H. H. Holmquist, wrote Devita three substantially identical letters on January 7, 1965 stating that upon completion of the investigation on the three charges, Devita was dismissed from the service of the Railroad. (NRAB File No. R. 4175521221 (hereinafter referred to as NRAB) Submission (1), Plaintiff's Exhibit 15) On February 1, 1965 Devita wrote H. H. Holmquist of the Railroad two letters denying the charges, requesting reinstatement with compensation for time lost, and appealing the decision of dismissal for rule violations. (NRAB Plaintiff's Exhibit 18) On April 13, 1965 Devita again wrote H. H. Holmquist, of the Railroad, stating in pertinent part:

> "Enclosed are two copies of letters of my appeal of my dismissal which I sent you dated February 1, 1965 of which I did not receive an answer. The certified return card number is 237901.
>
> I put in time slips for the time I was withheld from service pending the investigation for which I have received no answer nor have I been paid for that time.
>
> These appeals have well passed the sixty day time limit without being answered, set down by the labor board.

> Therefore I am asking that I be reinstated and paid for the time lost. (. . .)"

(NRAB Plaintiff's Exhibit 20; Carrier's Exhibit 19)

On April 15, 1965 a letter to Devita from the Railroad, signed "H. H. Holmquist" stated that the Railroad **had** responded to Devita's letters of February 1, 1965 by letters dated February 18, 1965 and had denied Devita's request for reinstatement and compensation for time lost (NRAB Carrier's Exhibit 20).

Thereafter on June 10, 1965 Devita wrote C.M. Rasmussen, General Manager of the Railroad and appealed his claim. In that letter he stated, **inter alia**:

> "Mr. H. H. Holmquist, Superintendent, failed to answer my certified letter within the sixty day limitation period as set by the labor board."

(NRAB Plaintiff's Exhibit 22)

By letter dated June 22, 1965 C. M. Rasmussen denied Devita's claim stating:

> "Among the many allegations you have made is one that Superintendent Holmquist did not reply to your two letters dated February 1, appealing for reinstatement and time loss. I have in my file two letters dated February 18, 1965 to you from Superintendent Holmquist denying your appeals."

(NRAB Plaintiff's Exhibit 23)

Subsequent thereto, on July 9, 1965 Devita wrote C. A. Pearson, Vice President of the Railroad, appealing the denial of C. M. Rasmussen. Again, Devita reiterated his claim that the Railroad had failed to deny his claim within the sixty day limitation period and that therefore he was entitled to reinstatement with compensation for time lost. On August 12, 1965 C. A. Pearson denied Devita's appeal stating in part:

> "Moreover your assertion that Superintendent Holmquist failed to answer your letter of initial appeal within sixty days is also fiction. In separate letters mailed to you at East 1648 Crown, Spokane, Washington, under date of February 18, in response to your two respective letters dated February 1, 1965, Superintendent Holmquist notified you of his denial decisions of your claims. Therefore, the real fact of the matter is that your claims are barred under the time limit on claims rules because you did appeal the same to the general manager within 60 days of Superintendent Holmquist's February 18th declinations."

(NRAB Plaintiff's Exhibit 25)

At this point it is important to note a series of events which occurred within the same time frame as the above correspondence.

On March 4, 1965, W. H. Rubright, local chairman of the Brotherhood of Locomotive Engineers, Devita's representative union, wrote H. H. Holmquist of the Railroad stating:

> "I herewith enter an appeal for locomotive engineer Joe Devita who was dismissed from service . . ."[1]
>
> (NRAB Carrier's Exhibit 31)

On March 5, 1965, a letter by H. H. Holmquist denied the appeal of March 4, 1965. Rubright again wrote Holmquist on March 24, 1965 informing the Railroad that:

> "We are sorry, but we cannot accept your decision on this appeal and are therefore sending this file to the general chairman, C. D. Kempf, in St. Paul for further handling."
>
> (NRAB Carrier's Exhibit 33)

The record before the NRAB further discloses that the following correspondence regarding Devita's claim ensued between C. D. Kempf and various members of the Railroad heirarchy:

May 3, 1965	— letter, Kempf to Holmquist (NRAB Carrier's Exhibit 34)
May 6, 1965	— letter, Holmquist to Kempf (NRAB Carrier's Exhibit 35)
June 28, 1965	— letter, Kempf to Rasmussen (NRAB Carrier's Exhibit 36)
July 1, 1965	— letter, Rasmussen to Kempf (NRAB Carrier's Exhibit 37)
July 8, 1965	— letter, Kempf to Pearson (NRAB Carrier's Exhibit 38)

[1]Note that this letter was sent to and received by the Railroad within 60 days after the much-disputed letter of February 18, 1965.

August 9, 1965 — letter, Pearson to Kempf (NRAB Carrier's Exhibit 30)

The significance attached to this correspondence is treated in Petitioner's Argument, **post**.

In due course, Devita referred his claim for reinstatement with compensation for time loss to the National Railroad Adjustment Board, pursuant to Sec. 153, First (i) of the Railway Labor Act, 45 **U.S.C.A.**, 153 First (i). After submissions by Devita, appearing **pro se**, and the Railroad, the NRAB entered "awards" dismissing Devita's three claims. The basis for dismissal in each of the causes was the same:

> ". . . we find that the claimant did not further handle his claim within the time limits of Rule 93. The claim is therefore **dismissed**."

(R. 5, 6, 7).

The particular violation referred to by the NRAB was Devita's failure to appeal from the Railroad's letter of February 18, 1965 within sixty days, as required by Rule 93(b) of the collective bargaining agreement then in force between the Railroad and the Brotherhood of Locomotive Engineers. Rule 93 provides:

> "(a) All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the company authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, **the carrier shall, within 60 days from**

the date the same is filed, notify the employe or his representative of the reasons for such disallowance. If not so notified, the claim or grievance shall be considered valid and settled accordingly, but this shall not be considered as a precedent or waiver of the contentions of the carrier as to other similar claims or grievances.

"(b) If a disallowed claim or grievance is to be appealed, such appeal must be taken **within 60 days from receipt of notice of disallowance**, and the representative of the carrier shall be notified of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employes as to other similar claims or grievances.

"(c) The procedure outlined in paragraphs (a) and (b) shall govern in appeals taken to each succeeding officer. Decision by the highest officer designated to handle claims and grievances shall be final and binding unless within 60 days after written notice of the decision of said officer he is notified in writing that his decision is not accepted. All claims or grievances involved in a decision of the highest officer shall be barred unless within one year from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before a tribunal having jurisdiction pursuant to law or agreement of the claim or grievance involved. It is understood, however, that the parties may by agreement in any particular case extend the one year period herein referred to.

"(d) All rights of a claimant involved in continuing alleged violations of agreement shall, under under this rule, be fully protected by continuing

to file a claim or grievance for each occurrence (or tour of duty) up to the time when such claim or grievance is disallowed by the first officer of the carrier. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.

"(e) **This rule recognizes the right of representatives of the organization party hereto to file and prosecute claims and grievances for and on behalf of the employe it represents.**

"(f) This rule shall not apply to requests for leniency." (emphasis added)

In his submission to the NRAB Devita adamantly denied the charges levied against him by the Railroad and also asserted he never **received** the Railroad's letters of February 18, 1965 and that therefore the limitation period could not have expired and constituted a bar to his appeal. Before the NRAB Devita submitted affidavits from himself, his wife and his son all attesting to the fact that no letters were delivered to the Devita home. (NRAB Plaintiff's Written Submission pp.). Devita also sought to obtain an affidavit from his postman to the same effect, the postman was willing to sign an affidavit but only after being subpoenaed by the NRAB. The NRAB refused request by Devita to issue the subpoena. (R. 147-8)

REASONS FOR GRANTING THE WRIT

The issue before the Federal District Court in this case was whether Devita had complied with the internal appellate procedure governing company-employee disputes (Rule 93), thereby perfecting his right to review by the NRAB. The NRAB dismissed all Devita's claims on the basis of failure to comply with Rule 93 of the case. Devita appealed to Federal District Court, which reversed the NRAB, holding:

> "The National Railroad Adjustment Board, First Division, has not treated this case on the merits as required by **Gunther v. San Diego & Arizona Eastern Railway**, 382 U.S. 257 (1965). The board has bypassed a determination on the merits and, in the opinion of the undersigned, has failed to comply with the requirements of 45 U.S.C.A. 153." (Court's memo opinion, pp. 3-4)

The district court remanded for a consideration of the merits of the claim.

The Ninth Circuit Court of Appeals reversed. The Per Curiam opinion stated in pertinent part:

> "If the question were properly before the courts and we had heard and seen the witnesses, we might have found the facts just as the district court did, i.e., no notice. But the right of courts to review the work of the Railroad Adjustment Board is very, very limited. See **Brotherhood of R. R. Trainmen v. Chicago River & Indiana R. R. Co.**, 353 U.S. 30 (1957).

We are concerned with 45 U.S.C. §153, First (m), as it read prior to 1966 and with the 1966 amendment.

We conclude that this procedural issue, on facts like the ones here, is simply left forever with the Board.

The main case cited by Devita, **Gunther v. San Diego & Arizona E. Ry. Co.**, 382 U.S. 257 (1965), really undercuts his position.

Here in Devita's case, the trial court made a de novo determination of fact. Some God in heaven may know that it was right and the board was wrong. But Congress does not seem to have committed to us the function of reviewing factual determinations on procedural steps, especially where there was some evidence to support the Board's conclusion."

(Opinion, p. 2)

Legally, this case is significant in that it raises the questions: what is the scope of review of procedural issues in NRAB cases? The two lower courts herein have disagreed on this issue. Factually, the record indicates that NRAB's "award" is unsupportable, unreasonable and in the language of **Gunther**, "wholly baseless". Set forth below is brief argument concerning the legal and factual aspects of this case.

This Court has stated on several occasions that the legislative design of the Railway Labor Act is to attain "effective and final decisions of grievances which arise daily" by the Board. **Union Pacific R. Co. v. Price**,

360 U.S. 601 (1958). However, as pointed out in **Bro. of Rwy Trainmen v. Central of Georgia Rwy Co.**, 415 F.2d 403, 412 (5th Cir. 1969), "finality is a mirage if relied upon to preclude **any** judicial review of an arbitration award . . . ." In **Gunther v. San Diego & Arizona Eastern Rwy Co.**, 382 U.S. 257 (1965) this Court found that an award of money damages was "wholly separable from the merits of the wrongful discharge" and therefore subject to judicial review by the Federal Court. Although the particular holding in **Gunther**, that the designation of money damages was not an issue relating to the merits of the claim, has been superceded by the 1966 amendments to the Railway Labor Act, the underlying principle enunciated therein remains intact—that principle being that where the issue involved is wholly separable from the merits judicial review is available. The issue of whether the appeal to the NRAB was perfected in compliance with the Railroad's internal appellate procedure is clearly an inquiry distinct from the merits. The Circuit Court flatly stated no terrestrial review existed and deferred the matter to "some God in heaven". This ruling does not square with **Gunther** or the 1966 amendments. Limiting review on the merits is one thing where the full case was heard by the Board and the claimant has had his "day in court", but in a situation where the merits have never been reached and the claimant has not been allowed to put on his evidence a Court of review should sedulously inspect procedural rulings on a legal and factual basis to insure that a claimant has properly been denied a hearing on the merits.

The NRAB found Devita had not perfected his appeal through internal channels. Devita[1] claimed he did and offered substantial evidence to that effect. (see argument, **post**) On appeal the District Court found Devita had perfected an appeal to the NRAB and remanded for a consideration on the merits. This decision was in line with **Gunther** and the purpose and intent of the Railway Labor Act. This Court should grant this Petition for Certiorari and clearly establish the extent of review by a federal court with respect to Board rulings on procedural questions regarding perfection of appeals to the Board.

From a factual standpoint the Board's ruling is unsupportable. A brief discussion of the ruling will indicate why the district court reversed and remanded. The rule governing the parties in this case is Rule 93 of the Collective Bargaining Agreement. The rule provides in part:

> "(. . .) Should any such claim or grievance be disallowed, the carrier shall, within 60 days from the date same (claim) is filed, notify the employee or his representative of the reasons for such disallowance (. . .)"

Rule 93(a)

> "(b) If a disallowed claim or grievance is to be appealed, such appeal must be taken within 60 days from receipt of notice of disallowance . . . ."

---

[1]Devita appeared **pro se** throughout the NRAB proceedings.

In 1964 Devita was dismissed from the Railroad on charges of inciting and inducing insubordination in connection with his representation of another engineer in an investigation before Railroad officials and two additional counts of insubordination involving Devita's notation of equipment defects on his time slip. (NRAB File No. R 4175521221—hereinafter referred to as record). Devita filed a timely claim with the Railroad under Rule 93. Sixty days passed and Devita wrote the Railroad seeking reinstatement since his claim had not been disallowed within 60 days. The Railroad responded saying that it had **sent** the notice of disallowance and further that 60 days had elapsed since said notice and therefore Devita's claim was stale and could not be processed through the next eschelon. On the basis of Devita's alleged failure to timely process his claim to the next stage of appeal within the Railroad the NRAB dismissed all 3 of Devita's claims. The Railroad, at the NRAB submission, could only prove that it **sent** the notice of disallowance, not that said notice was received.[3] Devita offered evidence by himself, his wife and family proving that the letter in question had never been received.[4] Devita's argument throughout this proceeding has been that assuming, **arguendo**, the Railroad sent the letter, the evidence before the Board

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[3]This notice by the Railroad was the only piece of correspondence between the parties not sent by registered or certified mail.

[4]Devita also sought to obtain an affidavit from his postman to the same effect—the postman was willing to sign an affidavit but only after being subpoenaed by the NRAB. The NRAB refused requests by Devita to issue the subpoena (R.147-8).

was undisputed that Devita never **received** the letter, thus even if both parties' assertions are taken as true, Devita's claim was not barred by Rule 93 for the onus is clearly placed upon the Railroad to prove **notification** and **receipt**, and the record is devoid of any evidence tending to demonstrate anything other than the fact that the Railroad **sent** the letter.[5]

The NRAB, whose members are non-lawyers, determined on the basis of a procedural technicality to deny Devita's claims. The merits of the claims were never reached. The District Court found this ruling erroneous. The Circuit Court simply said there is no review of procedural issues. The effect of the Circuit Court's decision is to deny a claimant a hearing on the merits on the basis of a legal technicality decided by persons not fully conversant on the subject without any subsequent review of such an "outcome determinative" finding. The issue was "wholly separable" from the merits. The substantive aspects of Devita's claim were never reached. Petitioner does not seek to alter the scope of review as to the merits of an NRAB claim, he simply states that case law and the Act permit review by the District Court on procedural rulings which foreclose consideration of the merits of the claim.

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[5]Devita also claimed in the lower courts that the union representative had (fortuitously) lodged a timely appeal with the carrier during this time frame. In its amendment to its original per curiam opinion the Circuit Court, despite the fact it held in the main opinion that no review existed, said the NRAB's ruling on this issue was not "wholly baseless".

CONCLUSION

On the basis of the foregoing it is respectfully requested that this Court issue a Writ of Certiorari in this case.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX "A"

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

With Referee Don Hamilton

Award 21 221

Docket 41 755

Parties (Joe K. Devita
To (
Dispute (Great Northern Railway Company

Statement Of Claim: "Claim is made for reinstatement with Full compensation from December 2, 1964 to date of reinstatement to service because of unjust dismissal, for Joe K. Devita, Engineer, on account of dismissal from service January 7, 1965, and that his record be cleared of all charges arising from investigation held December 22, 1964 at Spokane, Washington."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Following an investigation on December 22, 1964 of the claimant's alleged misconduct, he was notified by letter, dated January 7, 1965, that he was dismissed from Carrier's service. He appealed that decision to his Superintendent who, according to evidence of record, declined the claim and reitereated the decision of dismissal by letter dated February 18, 1965.

Carrier contends that this claim is barred by claimant's failure to notify the Superintendent that the latter's decision was not acceptable and failure to appeal such decision to the next higher officer within 60 days as required by Rule 93.

Claimant seeks to avoid the time limit bar by alleging that he did not receive the Superintendent's letter-decision of February 18, 1965. However, this denial is insufficient to rebut the evidentiary showing of record that the Superintendent declined the claimant's appeal in the normal course of business as contended by Carrier.

Accordingly, we find that the claimant did not further handle his claim within the time limits of Rule 93. The claim therefore is dismissed.

Award: Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

Dated at Chicago, Illinois
This 26th Day of January 1968.

Attest:
Executive Secretary

APPENDIX "B"

Form 1

NATIONAL RAILROAD ADUSTMENT BOARD
FIRST DIVISION

With Referee Don Hamilton

Award 21 222
Docket 41 756

Parties (Joe K. Devita
To (
Dispute (Great Northern Railway Company

Statement Of Claim: "Claim is made for reinstatement with full compensation from December 2, 1964 to date of reinstatement to service because of unjust dismissal from service January 7, 1965 and that Joe K. Devita's record be cleared of all charges arising from investigation held December 28, 1964 at Spokane, Washington."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

The findings and Award of this Division in Award 21 221 are determinative of the issues presented in this Docket and are therefore adopted herein as controlling. Accordingly the instant claim will be dismissed.

Award: Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

Dated at Chicago, Illinois
This 26th Day of January 1968.

Attest:
Executive Secretary

APPENDIX "C"

Form 1

NATIONAL RAILROAD ADUSTMENT BOARD
FIRST DIVISION

With Referee Don Hamilton

Award 21 223
Docket 41 757

Parties (Joe K. Devita
To (
Dispute (Great Northern Railway Company

Statement Of Claim: "Claim is made for reinstatement with full compensation from December 2, 1964 to date of reinstatement of service because of unjust dismissal from service January 7, 1965 and that Joe K. Devita's record be cleared of all charges arising from investigation held December 28, 1964 at Spokane, Washington."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

The findings and Award of this Division in Award 21 221 are determinative of the issues presented in this Docket and are therefore adopted herein as controlling. Accordingly the instant claim will be dismissed.

Award: Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

Dated at Chicago, Illinois
This 26th Day of January 1968.

Attest:
Executive Secretary

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

JOE K. DEVITA,	(	
Plaintiff,	(	NO. 3221
	(	
vs.	(	MEMO
	(	DECISION
GREAT NORTHERN RAILWAY COMPANY, and NATIONAL RAILROAD ADJUSTMENT BOARD, FIRST DIVISION,	(	
	(	
	(	
	(	
Defendants.	(	

This case came on regularly for trial and was submitted on the agreed facts and on the record made before the National Railroad Adjustment Board.

Plaintiff, Joe K. Devita, is a citizen and resident of Spokane County, Washington. The defendant, Great Northern Railway Company, is a common carrier by rail and was such during all of the times herein mentioned. It was incorporated under the laws of the State of Minnesota, where it has its principal place of business, and does business within the Eastern District of Washington.

Defendant, National Railroad Adjustment Board, First Division, is a statutory board created and

governed by the provisions of the Railway Labor Act, 45 U.S.C.A. 153, and has its headquarters in Chicago, Illinois.

For twenty-two (22) years prior to December 1964 plaintiff was continuously employed by the Great Northern Railway Company as a locomotive engineer. In December 1964 plaintiff was charged by defendant, Great Northern Railway Company, with one count of inciting and inducing insubordination in connection with his representation of another engineer in an investigation before Great Northern officials. He was also charged with two counts of insubordination involving plaintiff's notation of equipment defects on his time slips after having been previously instructed by the master mechanic not to do so. In December 1964 investigations and hearings were held by Great Northern officials, which resulted in plaintiff's discharge from employment. Plaintiff was notified of his discharge on January 7, 1965.

The proceedings by the Great Northern against plaintiff were subject to the provisions of Rules 77 and 93 of the Collective Bargaining Agreement then in force between the Great Northern Railway Company and its engineers.

Following his discharge plaintiff processed an appeal up to and including the highest designated official of the Great Northern Railway Company. The final decision of the highest official was communicated on August 28, 1965.

On July 29, 1966, plaintiff filed ex parte submissions with defendant, National Railroad Adjustment Board, First Division, in which plaintiff asked for an award of reinstatement with back pay on each of the charges for which he had been fired. These proceedings were assigned document numbers by the board as follows: 41 755; 41 756; and 41 757. On January 26, 1968 awards were made in all three causes dismissing the plaintiff's claims. Award 21 221 was as follows:

> "Following an investigation on December 22, 1964 of the claimant's alleged misconduct, he was notified by letter, dated January 7, 1965, that he was dismissed from Carrier's service. He appealed that decision to his Superintendent who, according to evidence of record, declined the claim and reitereated the decision of dismissal by letter dated February 18, 1965.
>
> "Carrier contends that this claim is barred by claimant's failure to notify the Superintendent that the latter's decision was not acceptable and failure to appeal such decision to the next higher officer within 60 days as required by Rule 93.
>
> "Claimant seeks to avoid the time limit bar by alleging that he did not receive the Superintendent's letter-decision of February 18, 1965. However, this denial is insufficient to rebut the evidentiary showing of record that the Superintendent declined the claimant's appeal in the normal course of business as contended by Carrier.
>
> "Accordingly, we find that the claimant did not further handle his claim within the time limits of Rule 93. The claim therefore is dismissed."

Each of the other two claims show awards similar to that in Award 21 221.

The National Railroad Adjustment Board, First Division, has not treated this case on the merits as required by **Gunther v. San Diego & Arizona Eastern Railway**, 382 U.S. 257 (1965). The board has bypassed a determination on the merits and, in the opinion of the undersigned, has failed to comply with the requirements of 45 U.S.C.A. 153.

Accordingly, the determinations of the National Railroad Adjustment Board, First Division, are set aside and remanded for proceedings on the records heretofore made to determine the merits of the controversy between the plaintiff and the defendants, and particularly the merits of the three complaints referred to above.

The plaintiff is requested to prepare judgment of remand. This memo decision shall constitute such findings of fact as are necessary herein.

DONE BY THE COURT this 30th day of November, 1971.

CHARLES L. POWELL
United States District Judge

ATTEST: A True Copy.
J.R. FALLQUIST, Clerk
United States District Court
Eastern District of Washington

By _____
Deputy Clerk

APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE K. DEVITA, Plaintiff-Appellee,	(	
vs.	(	NO. 72-1776
BURLINGTON NORTHERN INC., successor in interest by merger to Great Northern Railway Company, Defendant-Appellant.	(	

(March 11, 1974)

Appeal from the United States District Court
for the Eastern District of Washington

Before: CHAMBERS and SNEED, Circuit Judges; and BURNS,* District Judge.

PER CURIAM:

The judgment of the district court setting aside the determinations of the National Railroad Adjustment Board, First Division, is reversed.

Devita, a locomotive engineer, was discharged for alleged insubordination and inducing insubordination.

At issue is whether Devita took an appeal in time from the company superintendent to a higher official,

the general manager.[1] Devita says he did not get timely notice of the superintendent's decision, so he could not take a timely appeal. The railroad says the notice was promptly mailed, and its general manager and its vice president so ruled.[2]

When the case reached the Railroad Adjustment Board, it ruled that the notice was timely. The implication of the rulings are that Devita must have received the notice promptly.[3]

If the question were properly before the courts and we had heard and seen the witnesses, we might have found the facts just as the district court did, i.e., no notice. But the right of courts to review the work of the Railroad Adjustment Board is very, very limited. See **Brotherhood of R. R. Trainmen v. Chicago River & Indiana R. R. Co.**, 353 U.S. 30 (1957).

We are concerned with 45 U.S.C. §153, First (m), as it read prior to 1966 and with the 1966 amendment.[4]

We conclude that this procedural issue, on facts like the ones here, is simply left forever with the Board.

---

*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

[1] In the intra-company process there were three steps: review by the superintendent who had notified Devita of his discharge; review by a general manager; and finally a review by a vice president. After the third step, the case went to the Board.

The main case cited by Devita, **Gunther v. San Diego & Arizona E. Ry. Co.**, 382 U.S. 257 (1965), really undercuts his position.[5]

Here in Devita's case, the trial court made a de novo determination of fact. Some God in heaven may know that it was right and the board was wrong. But Congress does not seem to have committed to us the function of reviewing factual determinations on procedural steps, especially where there was some evidence to support the Board's conclusion.

As we read the Act and its history, it seems rather clear that Congress thought that it ordinarily would be best to keep these cases within the Board and out of the courts, and that such a rule would usually be to the advantage of the aggrieved workman.[6]

Here the thing cuts the wrong way for Devita.

---

[5]Devita was notified of his discharge on January 7, 1965. The superintendent's notice of denial was dated February 18, 1965. On June 22, 1965, the general manager denied the claim on the basis of the 60-day limitation for appeal from the superintendent in the collective bargaining agreement. The general manager did not review the merits. On August 12, 1965, the vice president denied the claim again on the ground used by the general manager.

On January 24, 1969, Devita filed his petition for a review with the National Railroad Adjustment Board. We do not understand the delay from 1965 to 1969, but the only time issue made anywhere as the case was en route is the delay on the appeal from the superintendent on the ruling of February 18, 1965.

[3]Appellee's brief makes an alternative contention that his union had a parallel appeal lodged with the railroad going for him and that the union submitted a timely notice of rejection of the superintendent's disallowance of Devita's claim. We cannot consider this argument because the point does not appear to have been raised in the district court.

[4]Prior to 1966, §153, First (m), provided that the Board's awards "shall be final and binding upon both parties, except insofar as they shall contain a money award." Act of June 21, 1934, ch. 691, §3, First (m), 48 Stat. 1189. The 1966 amendment to the Act deleted that provision and added a new subsection (q) which provides that the findings and orders of the Board shall be conclusive on review, except that the order may be set aside or remanded "for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud, or corruption by a member of the division making the order . . . ." 45 U.S.C. §153, First (q).

[5]In Gunther, supra, the Supreme Court recognized that Congress did not favor judicial review of the Board's decisions, and accordingly, the Court refused to expand the jurisdiction of the courts, even though the exception clause of §153, First (m), as it read prior to the 1966 amendment to the Act, might have been construed as allowing such an expansion. The current language of §153, First (m), cannot even arguably be interpreted as allowing exceptions beyond its plain language.

[6]We do not consider whether the 1966 amendments were retroactive because we conclude that the law before 1966 and after 1966 did not permit the district court's review in the area it acted.

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE K. DEVITA,

Plaintiff-Appellee,

vs.

BURLINGTON NORTHERN, INC., successor in interest by merger to Great Northern Railway Company,

Defendant-Appellant.

NO. 72-1776

ORDER DENYING PETITION FOR RE-HEARING AND AMENDING OPINION

(May 8, 1974)

On Appeal from the United States District Court for the Eastern District of Washington.

Before: CHAMBERS and SNEED, Circuit Judges, and BURNS, District Judge.

The opinion heretofore filed herein is amended by striking the second sentence of footnote 3 and substituting therefor the following:

> "The union appeal, however, was quite clearly taken from the railroad's denial of a claim for back wages for a portion of the period that Devita was suspended prior to his discharge. The NRAB's implicit determination that this appeal did not preserve Devita's claim for reinstatement was thus not wholly baseless."

The late petition for rehearing will be filed.

The petition for rehearing is denied.